

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LAWRENCE C. DiPIETRO, JR.,)	
)	
<i>Petitioner</i>)	
)	
v.)	<i>Docket No. 97-257-P-H</i>
)	
COMMISSIONER, DEPARTMENT)	
OF CORRECTIONS,)	
)	
<i>Respondent</i>)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, appearing *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his sentencing in the Maine Superior Court (Cumberland County) after his plea of guilty to charges of assault, terrorizing and violation of conditions of release. The amended petition (Docket No. 5) alleges as grounds for relief Sixth Amendment violations, prosecutorial misconduct, denial of equal protection, illegal arrest, improper indictment, due process violations, and errors in the report of the petitioner’s criminal record that was presented to the state court at the time of sentencing. The respondent has moved to dismiss the petition on the ground that the petitioner has failed to exhaust his post-conviction review remedies in state court, as required by 28 U.S.C. § 2254(b). Docket No. 8. I recommend that the court grant the motion to dismiss.

Habeas corpus petitioners face an initial hurdle in their search for relief from state criminal judgments that allegedly offend their federal constitutional rights. Such petitions must be summarily dismissed “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the

petitioner is not entitled to relief in the district court.” Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. In addition, the statute governing federal habeas corpus proceedings precludes a federal court from granting relief to a petitioner

unless it appears that — (A) the applicant has exhausted the remedies available in the courts of the State; or (B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant. . . . An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254(b)(1) and (c).

To exhaust a federal constitutional claim, a prisoner must present its “substance” in state court before seeking a second opinion through habeas corpus in federal court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). “In this area of federal-state relations, the exhaustion principle is the disputation sentry which patrols the pathways of comity. A habeas petitioner must have presented both the factual and legal underpinnings of his claim to the state courts in order for us to find it exhausted.” *Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989) (citations omitted). There is no indication in the record that the petitioner has presented the state courts with any request for post-conviction review raising the issues presented in his petition here. A direct appeal of his sentence was dismissed. Docket Sheet, *State v. DiPietro*, Cumberland County Docket No. CR97-617, at [3]-[4]. A request for leave to appeal the sentence is apparently still pending before the Sentence Review Panel of the Maine Supreme Judicial Court. *Id.* at [2], [4]. Thus, the petitioner has not exhausted his state court post-conviction remedies for the claims presented here.

Failure to exhaust is excusable under § 2254(b) if there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the

rights of the prisoner. To be “ineffective” within the meaning of § 2254(b), the state corrective process must be “so clearly deficient as to render futile any effort to obtain relief.” *Gagne v. Fair*, 835 F.2d 6, 9 (1st Cir. 1987) (quoting *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)). While the petitioner recites a litany of perceived abuses in his petition, he makes no showing that the state’s available processes of sentence review and other post-conviction review would not provide relief.

Failure to exhaust is also excusable if a petitioner demonstrates both cause and resulting prejudice. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Whitten v. Allen*, 727 F. Supp. 28, 30 (D. Me. 1989). Because the state corrective process is still available to the petitioner, he cannot show prejudice at this time. Nor can he show the miscarriage of justice that is the only other excuse for failure to exhaust state remedies. *Sawyer*, 505 U.S. at 339.

For the foregoing reasons, I recommend that the respondent’s motion to dismiss the petition for writ of habeas corpus be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 5th day of November, 1997.

David M. Cohen
United States Magistrate Judge